1849 Sedgwick Realty LLC and R & S Management a/k/a Arandess Management Company *and* Henry Minaya *and* Service Employees International Union, Local 32E, AFL–CIO. Cases 2–CA–30569 and 2–CA–31011

December 20, 2001

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On December 29, 2000, Administrative Law Judge Steven Davis issued the attached supplemental decision. The Respondents filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified below and to adopt the recommended Order as modified. Because the initial judge's decision and the Board's subsequent Decision and Order in this case are unpublished, a brief review both of the underlying facts and of the statutory violations found may help clarify the remedial questions at issue in this compliance proceeding.[1]

Prior to July 1, 1997,[2] 1849 Sedgwick Avenue, an apartment building in the Bronx, was owned by Morris Heights Apartments Inc. (Morris Heights). The service workers at 1849 Sedgwick Avenue were represented by Service Employees International Union, Local 32E (Local 32E), and as of July 1, there were five unit employees: Carmelo Delgado, Daniel Diaz, Juan Maria, Henry Minaya, and Jose Reyes (collectively, the discriminatees).

Morris Heights and Local 32E were parties to a collective-bargaining agreement (CBA). The CBA required employer contributions to Local 32E's Pension and Retirement Fund (Pension Fund) and to its Health and Welfare Fund (Health Fund) (collectively, the Funds). The CBA also included a sale-and-transfer clause, under which, in the event 1849 Sedgwick Avenue were sold, Morris Heights (as the seller) would be obligated to require the buyer to assume and adopt the CBA. If Morris Heights failed to do so, it would have to pay Local 32E, for the benefit of the building's unit employees, an amount calculated according to the CBA's formula for determining severance pay—2 weeks' salary for every year of employment. On July 1, Morris Heights sold 1849 Sedgwick Avenue to Respondent 1849 Sedgwick Realty LLC (Sedgwick Realty), but did not require Sedgwick Realty to assume and adopt the CBA. Local 32E's subsequent grievance against Morris Heights for breach of the sale-and-transfer clause went to arbitration, resulting in awards for Delgado, Maria, Minaya, and Reyes. Although liability for these awards rested on Morris Heights, Sedgwick Realty paid them.

Sedgwick Realty engaged Respondent R & S Management, also known as Arandess Management Company (Arandess), to manage 1849 Sedgwick Avenue. An Arandess agent, Isaac Rubinfeld, visited the building several times before the July 1 sale date. During one visit, he asked Minaya if Minaya would work without a union. He also told Diaz that Diaz would keep his job after the building was sold. On the afternoon of July 1, Rubinfeld arrived at the building with several men, and told Diaz to inform Delgado, Maria, Minaya, and Reyes that they were not being hired by the new owner. After Diaz had done so, Rubinfeld told him to go meet the new employees in front of the building. When he did so, Diaz discovered that an organizer from Factory and Building Employees Union Local 187 was talking to the men and handing out authorization cards. Diaz refused to sign. The next day, Rubinfeld ordered Diaz to sign a Local 187 card, and Diaz complied.

As these events were unfolding, Local 32E contacted Sedgwick Realty to demand recognition and bargaining, but its demands were refused. Instead, the Respondents[3] recognized and quickly agreed to contract terms with Local 187. Under these terms, the building's newly hired service employees (the "replacements")[4] were paid below the wage scale contained in the Local 32E CBA, and the Respondents made no contributions to any union fringe-benefit funds.

Based on these facts, the judge found that the Respondents had violated the Act. Rubinfeld's asking Minaya if he would be willing to work without a union was found to violate Section 8(a)(1). His ordering Diaz to sign an

[1] The initial judge's decision in this case was issued on August 13, 1999, by Administrative Law Judge Eleanor MacDonald. The Board adopted Judge MacDonald's decision pro forma in the absence of exceptions in an unpublished Decision and Order issued September 23, 1999. On December 17, 1999, the Second Circuit issued its judgment (unpublished) enforcing the Board's Order.

[2] All subsequent dates are in 1997 unless indicated otherwise.

[3] The Respondents were found by the Board, in the underlying case, to be joint employers.

[4] Seven individuals replaced Delgado, Maria, Minaya, and Reyes at 1849 Sedgwick Avenue for varying lengths of time during the backpay period: Juan Acosta, Franklyn Brea, Sigbert Bynoe, Jose Cuevas, Narciso Mendoza, Armando (or Amado) Palmero, and Jose J. Rodriguez.

authorization card was likewise found to violate Section 8(a)(1), and also to constitute the furnishing of unlawful assistance to Local 187 in violation of Section 8(a)(2). Unlawful assistance also tainted the Respondents' recognition of, and execution of a collective-bargaining agreement with, Local 187, making those acts violative of Section 8(a)(2) as well. The Respondents' refusals to hire Delgado, Maria, Minaya, and Reyes were found to have been motivated by their membership in Local 32E, and thus violations of Section 8(a)(3). Moreover, because the Respondents' refusal to hire their predecessor's employees was motivated by antiunion animus, the Respondents were held to have a duty to recognize and bargain with Local 32E. Their refusal to do so was found to violate Section 8(a)(5). The Respondents were also held not to have been free to set initial terms and conditions of employment for the replacements. Accordingly, their unilateral implementation of salaries below the Local 32E scale, and their failure to make Pension Fund or Health Fund contributions, were also found to violate Section 8(a)(5).

The judge ordered the Respondents, inter alia, (a) to reinstate Delgado, Maria, Minaya, and Reyes; (b) to make the discriminatees whole "for any loss of earnings and other benefits"; (c) to "[w]ithdraw recognition from Local 187 as the collective bargaining representative of the unit employees"; and (d) on Local 32E's request, to "rescind any departure from terms and conditions of employment that existed immediately prior to July 1, 1997, retroactively restoring preexisting terms and conditions of employment, including wage rates and benefit plans, and make whole the bargaining unit employees by remitting all wages and benefits that would have been paid absent unilateral changes beginning July 1, 1997, until such time as the Respondents and Local 32E bargain to agreement or to impasse."

A compliance proceeding was held to resolve disputes concerning backpay amounts due to Delgado, Maria, Minaya, and Reyes. The particulars of these disputes and the judge's findings resolving them are fully explained in the judge's supplemental decision. We agree with and adopt the judge's findings concerning backpay for Delgado, Maria, Minaya, and Reyes as set forth in sections I, A, 3-6 of his decision. The judge also made findings resolving several disputes concerning the Order as it applies *collectively* to the discriminatees and/or the replacements. We adopt the judge's findings that backpay owing to the discriminatees includes unpaid bonus payments,[5] and that the Respondents' backpay obligation is not to be reduced by the amount of Sedgwick Realty's so-called "severance payments" in satisfaction of Morris Heights' liability for breaching the CBA's sale-and-transfer clause. We also adopt the judge's finding that the Respondents must make contributions to the Pension Fund and Health Fund on behalf of the discriminatees. We disagree, however, with the judge's finding that the Respondents must contribute to the Funds on behalf of the replacements.

1. Payments for breach of the sale-and-transfer clause[6]

The judge found that the Respondents may not offset against their backpay obligations the payments made by Sedgwick Realty to satisfy Morris Heights' liability for breaching the sale-and-transfer clause of the CBA. As stated above, the sale-and-transfer clause obligated the seller of a building that employs bargaining-unit workers to require the building's buyer to assume and adopt the CBA. When Morris Heights sold 1849 Sedgwick Avenue, it failed to require assumption and adoption of the CBA by Sedgwick Realty. Accordingly, under the contractual penalty imposed for breach of the sale-and-transfer clause, Morris Heights became liable to Local 32E, for the benefit of the building's unit employees, for "severance pay . . . as if the employees were then terminated." Local 32E took the matter to arbitration, which resulted in Morris Heights being ordered to pay damages to Delgado, Maria, Minaya, and Reyes calculated according to the severance-pay formula. The checks that these four individuals received in satisfaction of the arbitral award, however, were drawn on the account of Sedgwick Realty, not Morris Heights. The record fails to explain why Sedgwick Realty satisfied Morris Heights' liability, nor does it reveal whether Morris Heights reimbursed Sedgwick Realty for the expense.

Characterizing these checks as "severance payments," the Respondents contended below that they are entitled to offset these payments against their backpay liability. The judge rejected this contention. While acknowledging that severance pay is considered interim earnings under *W.R. Grace & Co.*, 247 NLRB 698, 699 fn. 5 (1980), the judge found *W.R. Grace* inapplicable here because Sedgwick Realty's payments were not severance pay. They bore no relation to the Respondents' refusal to hire Delgado, Maria, Minaya, and Reyes, the judge pointed out, but rather were paid to satisfy a contractual penalty imposed on Morris Heights for its breach of the sale-and-transfer clause.

[5] In sec. I,B, par. 4 of his supplemental decision, the judge found that information concerning bonus payments owed to the discriminatees as part of their backpay was "entirely within the knowledge of [the] [R]espondent." There is no exception to this finding.

[6] For the reasons set forth in his separate partial dissent, Chairman Hurtgen does not join in this section of the decision.

We agree with the judge that the payments in question were not severance pay. Although the CBA refers to the penalty imposed on sellers for breach of the sale-and-transfer clause as "severance pay," that term is misleading. The CBA's severance-pay formula is used to calculate the amount of the penalty payment, but the payment is not "severance pay" because the duty to pay is not triggered by anyone's severance from employment. Rather, when a building's seller fails to obtain an assumption and adoption of the CBA from the buyer, it incurs a duty to pay the contract-breach penalty "*as if* the employees were then terminated" (emphasis added), regardless of whether the buyer retains the seller's employees or hires new ones.

In adopting the judge's "no offset" finding on this issue, we are not, as our dissenting colleague states, imposing a penalty on the Respondents or giving a windfall to the discriminatees. There is no penalty because we are merely ordering the Respondents to pay what *they* owe: backpay necessary to make the discriminatees whole for the Respondents' unlawful refusal to hire them. This entirely routine remedy is not rendered punitive by the fact that Sedgwick Realty *volunteered* to pay Morris Heights' contract-breach penalty. And there is no windfall because the two payments arise from separate and independent legal duties. Morris Heights' liability arose from its contract breach. The Respondents' liability arises from its unlawful refusal to hire the discriminatees. Because these two duties are independent of each other, reducing the backpay award by the amount of the contract-breach payment would result in the discriminatees receiving *less* than they are entitled to. Finally, contrary to our colleague, the fact that Diaz, who was retained, did not receive a contract-breach payment, while the nonretained discriminatees did, does not demonstrate that the payment was contingent on nonhire. No payment was sought for Diaz, so the arbitrator had no opportunity to decide whether Diaz was entitled to one. Had that question been presented, in our view the language of the sale-and-transfer clause would have compelled an award for Diaz as well.

2. Contributions to the Local 32E Funds[7]

The judge found that the Respondents must contribute to the Local 32E Pension Fund and Health Fund on behalf of the replacements. As required by the Board's Order in the underlying unfair labor practice decision, the Respondents offered reinstatement to Delgado, Maria, Minaya, and Reyes. All four accepted the offer and returned to work at 1849 Sedgwick Avenue in late November 1999, displacing the replacements. The evidence introduced at the compliance proceeding established that contributions to the Pension and Health Funds have never been made on the replacements' behalf. The Respondents made no such contributions during the replacements' employment at 1849 Sedgwick Avenue, and there was no evidence that any of the replacements has been employed since leaving 1849 Sedgwick Avenue by any other employer that contributes to the Funds. Further, according to the testimony of Stuart Gritz, a senior payroll auditor to the Funds, the Funds' actuaries set contribution rates for the owner of a particular building based on the number of service-employee positions at that building. Gritz testified that there are five such positions at 1849 Sedgwick Avenue. Finally, with respect solely to the Pension Fund issue, the Pension Fund has a 5-year vesting requirement, and none of the replacements was employed at 1849 Sedgwick Avenue longer than 2 years.

The judge based his decision to order contributions to the Funds on the replacements' behalf on the language of the Board's Order in the underlying unfair labor practice case. Explaining that he was limited in this compliance proceeding by the terms of that Order under *Dahl Fish Co.*, 299 NLRB 413, 424 (1990), the judge accurately stated that the Board's Order required the Respondents to "make whole the bargaining unit employees." Since the replacements were members of the bargaining unit during their employment at 1849 Sedgwick Avenue, the judge found that the replacements were entitled to have contributions made to the Funds on their behalf.

In determining whether contributions to the Funds are to be ordered on the replacements' behalf, our starting point is the settled principle that affirmative relief under Section 10(c) of the Act must be remedial, not punitive. *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961); *Iron Workers Local 377 (Alamillo Steel Corp.)*, 326 NLRB 375, 376 (1998). Adapting that principle to backpay remedies, the Supreme Court has stated that such a remedy "must be sufficiently tailored to expunge only the *actual*, and not merely *speculative*, consequences of the unfair labor practices." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984). Where employees possess a nonspeculative economic interest in a union pension or health fund, ordering contributions to that fund on the employees' behalf is remedial because such contributions "insure the fund's financial viability necessary to satisfy employees' future needs." *NLRB v. Coca-Cola Bottling Co. of Buffalo, Inc.*, 191 F.3d 316, 324 (2d Cir. 1999). See also *Stone Boat Yard v. NLRB*, 715 F.2d 441, 446

[7] For the reasons set forth in his separate partial dissent, Member Walsh does not join in this section of the decision to the extent his colleagues deny contributions to the Local 32E Pension Fund on behalf of the replacements.

(9th Cir. 1983) (contributions to union funds are properly ordered where employer's "diversion of contributions from the union funds undercut[s] the ability of those funds to provide for future needs"), cert. denied 466 U.S. 937 (1984); *Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 888 (D.C. Cir. 1997) (employer "must contribute to the union plans to the extent necessary to make employees absolutely whole and to ensure the plans' undiminished viability").[8] The Board does not require that employees be *certain* to benefit from a union fund before ordering contributions to that fund on their behalf. "Rather, the Board's established premise that such employees *may* have a future interest in the integrity of these funds is sufficient linkage to warrant that the trust fund contributions be paid." *Kenmore Contracting Co.*, 303 NLRB 1, 2 (1991) (emphasis added).

In keeping with this established premise, the Board has repeatedly ordered contributions to union funds on behalf of employees possessing a nonspeculative economic interest in those funds.[9] Conversely, however, where an individual's economic interest in a union fund is merely speculative, contributions to that fund may not be ordered on the individual's behalf. See, e.g., *Centra Inc.*, 314 NLRB 814, 819–820 (1994) (applying "economic interest" rule and ordering contributions upon finding requisite interest), enf. denied on other grounds 110 F.3d 63 (6th Cir. 1997); *Manhattan Eye Ear & Throat Hosp. v. NLRB*, 942 F.2d 151, 157–160 (2d Cir. 1991); *NLRB v. Transport Service Co.*, 973 F.2d 562, 569 fn. 3 (7th Cir. 1992).

Applying these principles to this case, we must determine whether the replacements have a nonspeculative economic interest in either the Health Fund or the Pension Fund. All of the replacements were discharged from 1849 Sedgwick Avenue when Delgado, Maria, Minaya, and Reyes were reinstated, and there is no evidence that any of them has been employed since his or her discharge by another employer that contributes to the Funds. The replacements have never had any connection to either of the Funds because contributions have never been made to the Funds on their behalf. Furthermore, none of the replacements is vested in the Pension Fund: that Fund has a 5-year vesting requirement, and no replacement worked at 1849 Sedgwick Avenue for more than 2 years.

Specifically with respect to Pension Fund contributions, the judge acknowledged that under *NLRB v. Coca-Cola Bottling Co. of Buffalo, Inc.*, 191 F.3d 316 (2d Cir. 1999), the replacements' future interest in the Pension Fund is merely speculative, precluding the Board from ordering contributions to that Fund on their behalf. The judge concluded, however, that the Board's decision in that case, *Coca-Cola Bottling Co. of Buffalo*, 313 NLRB 1061 (1994), compels contributions to the Pension Fund on the replacements' behalf. *Coca-Cola Bottling* is distinguishable, however.

In *Coca-Cola Bottling*, the Board was asked to decide, in relevant part, whether the respondent employer's liability included a duty to make contributions to a Teamsters pension fund. Ten years of credited service were required to vest a covered employee's interest in the Teamsters fund, but service did not have to be continuous to be credited. Under the fund's bridging rule, "[a]n individual not vested in the [p]lan would lose all credits on a 3-year break in service." 313 NLRB at 1067. In other words, unvested employees separated from employment would retain previously accrued service credits toward vesting if they found reemployment with a participating employer within 3 years of separation.

[8] In citing *Stone Boat Yard* and *Grondorf* together in support of the same principle, we are aware that these decisions express opposing views on another issue—namely, how to tailor the remedy in cases where the employer has violated Sec. 8(a)(5) by discontinuing required contributions to union benefit funds, while at the same time instituting its own company-paid fringe benefits plan. In *Stone Boat Yard*, the Ninth Circuit held that the Board could properly order the employer to remedy its 8(a)(5) violation by making all past-due contributions to the union funds without any offset for the cost of providing substitute benefits. 715 F.2d at 446. Other courts have disagreed with the Ninth Circuit and concluded that the Board must permit the employer to show that an offset would be appropriate. See, e.g., *Grondorf*, 107 F.3d at 888; *Manhattan Eye Ear & Throat Hosp. v. NLRB*, 942 F.2d 151, 159 (2d Cir. 1991).

Here, however, we are dealing not with the "substituted employer benefit plan" scenario presented in *Stone Boat Yard* and *Grondorf*, but with the question of whether individuals on whose behalf contributions to union funds have been ordered possess an economic interest in the future viability of those funds. On that issue, neither the Board nor the courts (including the Ninth and D.C. Circuits) have ever held that fund contributions may be ordered in the absence of such an interest, although disagreements have arisen in particular cases over whether the requisite interest has been demonstrated. Compare *Manhattan Eye, Ear & Throat Hospital*, 300 NLRB 201, 202 fn. 5 (1990), and *Coca-Cola Bottling Co. of Buffalo*, 313 NLRB 1061, 1068 (1994), with *Manhattan Eye*, 942 F.2d at 157, and *Coca-Cola Bottling*, 191 F.3d at 324–325.

[9] See, e.g., *Master Iron Craft Corp.*, 289 NLRB 1087, 1088 fn. 12 (1988) (ordering contributions to union funds on behalf of discriminatee "so that the discriminatee's future interests in the [f]und will be ensured"); *Mohawk Steel Fabricators*, 289 NLRB 1193, 1194 fn. 13 (1988) (same); *Achilles Construction Co.*, 290 NLRB 240, 241 fn. 12 (1988) (same), enfd. mem. per curiam 875 F.2d 308 (2d Cir. 1989); *Peelle Co.*, 291 NLRB 607, 608 fn. 13 (1988) (same); *Roman Iron Works*, 292 NLRB 1292, 1293 fn. 15 (1989) (same); *Ron Tirapelli Ford*, 304 NLRB 576 fn. 2 (1991) (ordering contributions to union funds on behalf of workers who "continue to be represented by the [u]nion and to have an interest in the viability of the funds"), enfd. in part and remanded in part 987 F.2d 433 (7th Cir. 1993); *Virginia Concrete Co.*, 316 NLRB 261 fn. 1 (1995) (same), enfd. 75 F.3d 974 (4th Cir. 1996).

The General Counsel sought contributions to the Teamsters fund on behalf of three individuals: Michael Haug, John McKissock, and Melvin Mingoia. Haug had already achieved a vested interest in the fund. McKissock had not, but he was still employed by the respondent and therefore still amassing service credits toward vesting. Mingoia was neither vested in the pension fund nor currently employed by the respondent or another participating employer. Fund contributions had been made on his behalf prior to the start of the backpay period, however, and less than 3 years had passed since Mingoia had been discharged. Under these circumstances, and citing *Manhattan Eye, Ear & Throat Hospital v. NLRB*, supra, the respondent argued, inter alia, that it should not be required to make pension fund contributions on Mingoia's behalf because Mingoia's "future interest in the [f]und is speculative at best." 313 NLRB at 1067.

Applying the same "economic interest" rule the Second Circuit relied on in *Manhattan Eye*, the Board in *Coca-Cola Bottling* found that pension fund contributions were properly ordered on behalf of all three individuals. Specifically with respect to Mingoia, the Board observed that contributions on his behalf would add to his credited years of service and thus reduce "the years he will need to accumulate to achieve vesting." 313 NLRB at 1067–1068. The Board then found that Mingoia's future interest in the Teamsters pension fund was "far from speculative" because Mingoia "may achieve vesting on reemployment by a participating employer [within the 3-year break-in-service period] and a continued 3 years of employment." Id. at 1068.

In the subsequent enforcement proceeding, the Second Circuit agreed with the Board that Haug's vested pension right and McKissock's current employment with a participating employer gave those two a future economic interest in the Teamsters pension fund. The court disagreed, however, with the Board's assessment of Mingoia's future interest in the union pension fund and denied enforcement of the corresponding part of the Board's Order. 191 F.3d at 324–325. In the Second Circuit's view, the "mere possibility" that Mingoia might be reemployed within 3 years of his discharge was "not sufficient to demonstrate a future interest" in the Teamsters pension fund. Id. at 324.

Like Mingoia, the replacements in the instant case are neither vested in a union pension fund nor currently employed by a participating employer; but it does not follow, as the judge evidently thought it did, that the replacements' interest in the Pension Fund is indistinguishable from Mingoia's interest in the Teamsters fund. Whether Mingoia's future interest was or was not too speculative to support the Board's order in *Coca-Cola Bottling*, the fact remains that there were grounds for finding that he had *some* interest in the Teamsters pension fund. Mingoia had chosen to work for a participating employer, and pension fund contributions had been made on his behalf prior to the start of the backpay period. Thus, he had already accrued service credits toward vesting, and he was either aware or could have informed himself that he would retain and add to his previously accrued credits by obtaining employment with another participating employer within a certain period of time. The replacements, by contrast, have never had any connection to the Local 32E Pension Fund. Indeed, the day they were hired by the Respondents, they signed authorization cards for Factory and Building Employees Union Local 187. Unlike Mingoia, they are not in the position of having had union fund contributions made on their behalf, and then discontinued. To the contrary, contributions have never been made to the Funds on the replacements' behalf, and they have never accrued any service credits toward vesting in the Pension Fund. To be sure, Board-ordered contributions to the Pension Fund on the replacements' behalf would have the effect of retroactively creating for them *some* interest in the Pension Fund in the first instance, albeit far from a vested interest. But where the entirety of an individual's interest in a pension fund would be created in the first instance by Board-ordered contributions, it is self-evident that the individual has no preexisting interest in that fund sufficient to warrant ordering contributions in the first place,[10] and less interest than any of the discriminatees in *Coca-Cola Bottling*.

Our dissenting colleague's argument that the replacements have a nonspeculative future interest in the Pension Fund places the cart before the horse. He first assumes that Pension Fund contributions on the replacements' behalf will be ordered. Then, based on the credited service accrued as a result of ordered contributions, he argues that the replacements' interest in the Pension Fund is less speculative than that of Mingoia's in his fund. But the question here is precisely whether contributions to the Pension Fund on the replacements' behalf are to be ordered in the first place. Under the circumstances of this case, the replacements' interest in the Pen-

[10] We need not decide here whether a different conclusion would be compelled had any of the replacements worked at 1849 Sedgwick Avenue long enough either to satisfy the Pension Fund's 5-year vesting requirement, or to make it reasonable to assume that he or she would satisfy it by obtaining reemployment with an employer that contributes to the Pension Fund.

sion Fund that would justify this remedy cannot be an interest *created* by the remedy itself.[11]

Further, nothing in the record makes it less than wholly speculative that the replacements might secure jobs in the future with contributors to the Local 32E or 32BJ pension funds. In *Coca-Cola Bottling*, by contrast, the Board found that Mingoia had at least manifested an interest in reemployment by a contributing employer by filing a Board charge seeking reinstatement. 313 NLRB at 1067. Here, however, there is no evidence that the replacements may work for contributing employers in the future. Indeed, there is some evidence that it would be difficult for them to secure such jobs. According to the testimony of Local 32E delegate Edwin Rivera, service jobs in union buildings in Rivera's district come open "one [sic] in a blue moon." Our colleague's sole response is to state that

> [i]f . . . the replacements are provided with the pension credits mentioned above, they will have no less an incentive to obtain future work with a participating employer than they would have if they had earned those credits with a participating employer before they began work with the Respondents.

In our view, this "no less incentive" reasoning does not rebut the hard facts of this case: there is no evidence of prior Fund participation; there is only a speculative prospect of future participation; and there is no interest in the Fund apart from what would be created were we to order contributions here. We decline to do so.

Additionally, because the number of discriminatees equals the number of service-worker positions at 1849 Sedgwick Avenue—five—the Fund contributions we are ordering on the discriminatees' behalf will sufficiently ensure the actuarial soundness of the Funds. See *J.R.R. Realty*, 301 NLRB 473 (1991), enfd. per curiam 955 F.2d 764 (D.C. Cir. 1992), cert. denied 506 U.S. 829 (1992). *J.R.R. Realty* closely resembles this case. The predecessor owner of a New York apartment building employed six service workers represented by SEIU Local 32B. The building was sold, and the successor buyer of the building, J.R.R. Realty, fired those six and hired four individuals in their place. Finding violations of the Act, the Board ordered remedies not materially different from those ordered in this case. At the compliance stage, the Board determined that the successor was required to make contributions to the union's health and pension funds for "six positions." 301 NLRB at 474 fn. 11. Basing contributions on the number of service-worker positions at the building, the Board stated, was "warranted in order to ensure the actuarial soundness of the funds." Ibid.

Similar reasoning applies here. According to the testimony of Senior Payroll Auditor Gritz, the Funds' actuaries set contribution rates based on the number of service-employee positions at a particular building. There are five such positions at 1849 Sedgwick Avenue. Thus, the Funds' actuarial interest will be met by the Respondents' ordered contributions on behalf of the five discriminatees.[12] With respect to the Pension Fund, a different situation might be presented if any of the replacements had worked at 1849 Sedgwick Avenue long enough to satisfy the Pension Fund's 5-year vesting requirement. If, under those circumstances, the Board were to order contributions to the Pension Fund, the result would be the retroactive vesting of that employee's interest in the Fund. In that situation, because the Pension Fund would acquire a corresponding duty to pay the replacement employee a pension sometime in the future, it also would have an actuarial interest in receiving employer contributions on his behalf, regardless of the number of service-worker positions at 1849 Sedgwick Avenue. Under the circumstances presented here, however, requiring contributions for more than five individuals would give the Pension Fund a windfall. So also, Health Fund contributions on the replacements' behalf would also effect a windfall: the replacements are not covered under the Health Fund plan and, therefore, the Health Fund is not at risk of paying benefits to them.[13]

[11] Our dissenting colleague expresses the view that ordering Pension Fund contributions on the replacements' behalf would restore the status quo "that would have existed had the Respondents complied with the law." Actually, had the Respondents conducted themselves lawfully, the discriminatees would have been retained, and the replacements never would have been hired in the first place. They were hired, however, and our remedy ensures that they will be made whole for their losses. But because they have no reasonable expectation of drawing benefits from the Pension Fund, ordering Fund contributions on their behalf would only penalize the Respondents and grant the Pension Fund a windfall.

[12] Disagreeing with this view with respect to the Pension Fund, our dissenting colleague contends that the Fund does possess an actuarial interest in receiving contributions on behalf of the replacements, as well as the discriminatees, because "the Board's order would effectively provide credit service for a double set of employees." But this would be the case only *if* the Board orders Fund contributions for the replacements, and that is the issue at hand.

[13] The absence of any actuarial interest on the part of the Pension Fund in receiving contributions on behalf of the replacements constitutes another way in which this case differs from *Coca-Cola Bottling*. In that case, Mingoia had already amassed over 2 years' worth of service credits toward vesting when he was discharged in September 1991, 313 NLRB at 1067, and the Board ordered contributions to the Teamsters pension fund on Mingoia's behalf in April 1994, well within the 3-year break-in-service period. Thus, at the time the Board ordered contributions to the Teamsters fund for Mingoia, the fund retained an actuarial interest in receiving those contributions because it had to account for the possibility that Mingoia might bridge his break in ser-

Under these circumstances, we find that the replacements' economic interest in the Funds is merely speculative at best, and therefore that the judge's decision must be reversed, and his recommended Order modified, insofar as they would require the Respondents to contribute to the Funds on the replacements' behalf. We reduce accordingly the amount the Respondents must contribute to the Health Fund and Pension Fund as noted below.[14] We adopt unchanged all the other amounts listed in the recommended Order, to the accuracy of which the parties have stipulated.

With respect to the Health Fund, we emphasize that the replacements, as unit employees, were wrongfully deprived of coverage they would have enjoyed had the Respondents acted lawfully by contributing to the Health Fund on their behalf while they were employed at 1849 Sedgwick Avenue. Thus, the replacements are entitled to be made whole by being reimbursed for any expenses ensuing from the Respondents' failure to make the required Health Fund contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). The General Counsel may seek reimbursement for such expenses, if any, on the replacements' behalf by issuing a further compliance specification.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, 1849 Sedgwick Realty LLC and R & S Management a/k/a Arandess Management Company, as a Joint Employer, shall make whole the individuals and entities named below by paying them the amounts following their names, plus interest on the backpay due the employees[15] and any additional amounts due the funds,[16] minus tax withholdings on the backpay due the employees required by Federal and State laws.

Carmelo Delgado	$35,448.84
Daniel Diaz	9,842.24
Juan Maria	65,325.00
Henry Minaya	14,220.00
Jose Reyes	60,692.78
Juan Acosta	$ 3,575.12
Franklyn Brea	3,283.22
Sigbert Bynoe	5,412.44
Jose Cuevas	3,735.94
Narciso Mendoza	2,943.00
Armando (or Amado) Palmero	3,457.50
Jose J. Rodriguez	12,464.32
SUBTOTAL	$220,400.40
Local 32E Health Benefit/Welfare Fund	$44,078.00
Local 32E Pension/ Retirement Fund	21,950.00
SUBTOTAL	$66,028.00
TOTAL	$286,428.40

Dated, Washington, D.C. December 20, 2001

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN HURTGEN, dissenting in part.

Contrary to my colleagues, I find that the severance payments made by the Respondent to Carmelo Delgado, Juan Maria, Henry Minaya, and Jose Reyes should offset the backpay owed to them by the Respondent.

The facts concerning the severance payments are not in dispute. The Respondent purchased the property at 1849 Sedgwick Avenue, Bronx, New York, from Morris Heights Apartments. Morris Heights and Service Employees International Union, Local 32E (Local 32E) were, for many years, parties to successive collective-

vice and resume his progress toward vesting. Here, by contrast, just as the replacements have no preexisting interest in the Local 32E Pension Fund, so also the Pension Fund has no actuarial interest in receiving contributions on their behalf.

[14] The amended specification shows the following Health Fund (HF) and Pension Fund (PF) contribution amounts for the several replacements: Juan Acosta, $2470 (HF), $1250 (PF); Franklyn Brea, $1964 (HF), $1000 (PF); Sigbert Bynoe, $3259 (HF), $1625 (PF); Jose Cuevas, $2470 (HF), $1250 (PF); Narciso Mendoza, $3036 (HF), $1500 (PF); Amado Palmero, $2783 (HF), $1375 (PF); Jose J. Rodriguez, $6042 (HF), $3000 (PF). The sum of these amounts equals $22,024 for the Health Fund, and $11,000 for the Pension Fund. The Health Fund and Pension Fund contributions called for in the judge's recommended Order were $66,102 and $32,950, respectively. Accordingly, the amounts the Respondents owe the Health Fund and Pension Fund are reduced to $44,078 and $21,950, respectively.

[15] See *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[16] See *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

bargaining agreements.[1] Their agreement, in effect at the time material here, contained a "sale and transfer clause." That clause provided, in relevant part, that if Morris Heights sold the property, the contract of sale must include a provision that the buyer would assume and adopt the collective-bargaining agreement. Otherwise, if Morris Heights failed to require the assumption and adoption of the bargaining agreement, it was required to pay severance pay to its unit employees.[2] On its face, the severance alternative to the contract assumption/adoption requirement was intended to compensate unit employees for lost earnings in the event of Morris Heights' failure to give effect to the requirement.

Morris Heights did not comply with the contractual sale-and-transfer provision when it sold the Sedgwick Avenue property to the Respondent. It thus incurred a severance pay liability to the four employees who were not hired by Respondent and who are discriminatees herein. The Respondent satisfied that severance liability by issuing checks, on its own account, to each of the four employees in satisfaction of the severance liability incurred by Morris Heights pursuant to its bargaining agreement with Local 32E. In the meantime, in the unfair labor practice case underlying this compliance proceeding, it was established that the Respondent violated the Act by failing to offer employment to the four employees. Accordingly, the Board ordered the Respondent to reinstate them and make them whole, with interest, for any loss of earnings and other benefits suffered as a result of the Respondent's discrimination against them.

The Respondent asserts that the severance payments made by it should offset the backpay ordered by the Board. Otherwise, there would be a "double back pay" award that would be a windfall to the discriminatees and a penalty on the Respondent. I agree.

It is well settled that severance payments are considered interim earnings and, thus, such pay offsets backpay awarded to discriminatees by the Board. *W.R. Grace & Co.*, 247 NLRB 698, 699 fn. 5 (1980). This is so because a backpay order is intended to restore the status quo ante the unfair labor practice and to make discriminatees whole for earnings lost as a result of an employer's discrimination against them.

In the instant case, the wrongdoer (the Respondent) has paid severance pay to the employees. Accordingly, that money is to be an offset against backpay.

The fact that the severance pay was the initial obligation of the predecessor is of no moment. The critical facts are that (1) Respondent unlawfully failed to hire the employees; (2) the Respondent paid them severance pay in light of their nonhire.

I would not require the Respondent to compensate the discriminatees twice, i.e., once by paying severance pay, and again by paying Board-ordered backpay without offset for the severance pay. Accordingly, I would find that an offset is required.

My colleagues say that Respondent is not being penalized because it voluntarily paid Morris Heights' severance obligation to the employees. In my view, the penalty occurs when the Board orders Respondent to pay backpay on top of that severance payment. Further, although the severance payment is based on a contract breach, and the backpay is based on an unfair labor practice, they are both for the same event, viz., the nonhire of the employees.

Finally, my colleagues argue that the payment by Respondent was not "severance pay." I disagree. The money was paid to the employees because they lost their employment, i.e., they were severed by the predecessor and not hired by the Respondent. Further, without regard to the semantic question of whether the money was "severance pay," the fact is that the Respondent has paid moneys to the discriminatees because of their nonhire, and the nonhire is the unfair labor practice.

Dated, Washington, D.C. December 20, 2001

Peter J. Hurtgen, Chairman

NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting in part.

I agree with my colleagues' decision, except in one respect. My colleagues find that the replacements' economic interest in the Local 32E Pension Fund is merely speculative at best. They would therefore reverse the judge's decision to the extent that it requires the Respondents to make contributions to the Pension Fund on the replacements' behalf covering the time period during which the Respondents should have applied the terms of the Local 32E contract to these employees. Unlike my colleagues, I would order the Respondents to contribute

[1] The contract between Morris Heights and Local 32E required the payment of severance pay to terminated employees.

[2] The contract of sale did not explicitly provide that Morris Heights would require that the buyer would retain the unit employees. However, that would appear to be the case. Indeed, it would be unlawful (under Sec. 8(a)(2)) for the buyer to adopt the contract without the employees. In addition, the alternative provision (severance pay) obviously operates when employees are not retained. Thus, the provision is an alternative to retention. Finally, the provision in fact operated that way. The employees who were not retained were paid severance pay, and the employee who was retained (Diaz) was not so paid.

to the Local 32E Pension Fund on behalf of the replacement employees. I find, in agreement with the judge, that they have a sufficient future interest in the Fund to warrant contributions to the Fund on their behalf.

I agree that a backpay remedy must be tailored to expunge only the actual, and not merely speculative, consequences of a respondent's unfair labor practices. See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984). While the Board does not order fund contributions where an employee's economic interest is speculative, the Board also does not require proof that an employee is *certain* to benefit from a fund in the future. See *Kenmore Contracting Co.*, 303 NLRB 1, 2 (1991) ("the Board's established premise that such employees *may* have a future interest in the integrity of these funds is sufficient linkage to warrant that the trust fund contributions be paid" (emphasis added)).[1]

The replacements' interest in the Pension Fund is not entirely speculative. While none of the replacement employees worked for the Respondents long enough to meet the Local 32E Pension Fund's 5-year vesting rule, they did work for periods ranging from about 8 months to 2 years. Thus, if they are provided with these pension credits they will be well on their way to meeting the Fund's vesting requirement. This is especially so given that a 5-year break-in-service rule applies,[2] and the replacements can earn credits through employment not only with any employer who participates in the Local 32E Pension Fund, but also with any employer whose employees are represented by a union that has a reciprocal agreement with Local 32E.[3]

My colleagues point out that there is no evidence that the replacement employees had previously chosen to work for an employer that contributes to the Local 32E Pension Fund, and infer from this that the replacements would not likely have any interest in future work with a participating employer. If, however, the replacements are provided with the pension credits mentioned above, they will have no less an incentive to obtain future work with a participating employer than they would have if they had earned those credits with a participating employer before they began work with the Respondents. It is the majority's failure to award the replacements these pension credits that will now serve to deprive them of that incentive.[4]

In *Coca-Cola Bottling Co. of Buffalo*, 313 NLRB 1061 (1994), the Board held that employee Melvin Mingoia had a sufficiently certain interest in the union fund involved there to warrant an order requiring fund contributions. This was despite the fact that Mingoia had earned only 2.3 years of credit service, the fund had a 10-year vesting requirement as well as a 3-year break-in-service rule,[5] and Mingoia was no longer employed by a participating employer. Id. at 1067. I am unpersuaded by my colleagues' efforts to argue that the replacements' interest in the Local 32E Pension Fund is more speculative. In fact, it seems quite clear that their interest is considerably less speculative. Although, like Mingoia, the replacement employees are not vested and are not currently working for a participating employer, they only need to earn 5 years of credit service, they can incur up to a 5-year break in service without losing any accrued pension credits, their fund has a reciprocity agreement with at least one other union fund, and some of the replacements have close to the amount of credit service that Mingoia had earned. With all due respect to the United States Court of Appeals for the Second Circuit, which denied enforcement of *Coca-Cola Bottling*, 191 F.3d 316 (2d Cir. 1999), I am compelled to apply the Board's decision in *Coca-Cola Bottling*. That decision, in my view and contrary to my colleagues' view, dictates a conclusion that the replacements' interest in the Local 32E Pension Fund is not too speculative to order fund contributions on their behalf.[6]

[1] The Board's Order in that case required payments into the various trust funds established by the collective-bargaining agreement. The Board stated that it was "evident from the language in our original Order . . . [that] the Respondents' obligation to provide the trust fund contributions *is not directly conditioned on there being a certainty* that the employees will benefit from these funds." *Kenmore Contracting Co.*, 303 NLRB at 2 (emphasis added).

[2] Under the Employee Retirement Income Security Act (ERISA), a plan may not disregard a participant's prior years of service under the plan based on a break in service unless the break in service exceeds the greater of 5 years or the aggregate number of years of service earned before the break in service. See 26 U.S.C. § 410(a)(5)(D)(i); 29 U.S.C. §§ 1052(b)(4)(A), 1053(b)(3)(D)(i).

[3] The Pension Fund's auditor, Stuart Gritz, testified that if employees obtain work at a Local 32E or Local 32BJ worksite, their years of service are accumulated towards the vesting requirement. Local 32BJ is a different local in the New York City area. Gritz testified that he knows of certain employees who started in 32BJ, then transferred to a Local 32E site, with service credits from each worksite being cumulative.

[4] My colleagues assert that my position places the "cart before the horse." The "horse" here, however, is the Respondents' unlawful failure to make contributions to the Pension Fund on behalf of the replacement workers. If the Respondents had done what they were legally required to do and made these contributions, the replacements then would have had a future interest in the Pension Fund. By ordering those contributions now we would be doing nothing more than recreating the situation that would have existed had the Respondents complied with the law.

[5] The Board in *Coca-Cola Bottling* did not indicate that this 3-year break-in-service rule would have been impermissible under then-applicable ERISA law.

[6] I also disagree with my colleagues' assertion that the Pension Fund's actuarial interests will be met by the Respondents' contributions on behalf of only the five discriminatees. My colleagues' conclusion is

Accordingly, I would, contrary to my colleagues, order the Respondents to make contributions to the Local 32E Pension Fund on behalf of the replacement employees.[7]

Dated, Washington, D.C. December 20, 2001

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

Ruth Weinreb, Esq., New York, NY, for the General Counsel.
Morris Tuchman, Esq., New York, NY, for the Respondents.

SUPPLEMENTAL DECISION

PRELIMINARY STATEMENT

STEVEN DAVIS, Administrative Law Judge. On August 13, 1999, Administrative Law Judge Eleanor MacDonald issued a Decision in which she found, inter alia, that 1849 Sedgwick Realty LLC and R & S Management a/k/a Arandess Management Company, as a Joint Employer (Respondents), violated Section 8(a)(1), (3) and (5) of the Act in certain respects, and as an appropriate remedy, ordered Respondents to recognize and bargain with Service Employees International Union, Local 32E, AFL-CIO (Union). The Order also provided that Respondents (a) rescind any departure from the terms and conditions of employment that existed immediately prior to July 1, 1997 (b) retroactively restore preexisting terms and conditions of employment, including wage rates and benefit plans and (c) make whole the bargaining unit employees by remitting all wages and benefits that would have been paid absent unilateral changes beginning July 1, 1997, until such time as the Respondents and the Union bargain to agreement or to impasse.

No exceptions were taken to Judge MacDonald's Decision, and on September 23, 1999, the Board issued its Decision and Order adopting the recommended Order. On December 17, 1999, the United States Court of Appeals for the Second Circuit issued a Judgment enforcing the Board's Order.

A controversy having arisen over the amount of backpay due to the employees, the Acting Regional Director for Region 2 issued a Compliance Specification and Notice of Hearing on March 24, 2000.

A hearing was held before me on July 10 and 12, 2000 in New York City. At the hearing it was stipulated that on October 29, 1999, Respondents offered reinstatement to Carmelo Delgado, Juan Maria, Henry Minaya and Jose Reyes, and that in late November, 1999, they accepted the offers and returned to work at 1849 Sedgwick Avenue, Bronx, New York.

Upon the entire record, including my observation of the demeanor of the witnesses and the briefs filed by General Counsel and Respondents, I make the following:

I. FINDINGS OF FACT

A. The Search for Work

1. Legal Principles

A discriminatee is entitled to backpay if he makes a "reasonably diligent effort to obtain substantially equivalent employment." *Moran Printing*, 330 NLRB No. 54, slip op. at 1 (1999).

In *Fabi Fashions*, 291 NLRB 586, 587 (1988), the Board enunciated the following principles:

> In seeking to mitigate loss of income a backpay claimant is held only to reasonable exertions in this regard, not the highest standard of diligence. The principle of mitigation of damages does not require success, it only requires an honest good faith effort. The burden of proof is on the employer to show that the employee claimant failed to make such reasonable search or that he willfully incurred losses of income or was otherwise unavailable for work during the backpay period. In applying these standards, all doubts should be resolved in favor of the claimant rather than the respondent wrongdoer.

What constitutes a good faith search for work depends upon the facts of each case. The Board stated in *Flannery Motors, Inc.*, 330 NLRB 994, 995 (2000).

> A good faith effort requires conduct consistent with an inclination to work and to be self-supporting and that such inclination is best evidenced not by a purely mechanical examination of the number or kind of applications for work which have been made, but rather by the sincerity and reasonableness of the efforts made by an individual in his circumstances to relieve his unemployment. Circumstances include the economic climate in which the individual operates, his skill and qualifications, his age and his personal limitations.

2. Union Representative Edwin Rivera

Union representative Rivera testified that Delgado, Maria and Reyes called him on July 1, 1997 when they were refused hire by Respondents. He asked them to come to the Union office which they did. Rivera stated that 1 week after their visit he

based on the testimony of Senior Payroll Auditor Gritz, who stated that the Fund's actuaries set contribution rates based on the number of service employee positions at a particular building. My colleagues misapply that testimony here. It is illogical to base actuarial calculations on the assumption of a single set of employees where the Board's order would effectively provide credit service for a double set of employees during a certain period of time. A pension fund has an actuarial interest in receiving funds to cover any credit service earned by any employee, because the fund incurs a potential obligation to make future benefit payments to every employee to the extent of the employee's credit service. Thus, to ensure that the Local 32E Pension Fund's actuarial interests are properly served, the Respondents must be ordered to make contributions on behalf of all employees who have earned credit service, including both the discriminatees and the replacements.

[7] I agree with my colleagues' conclusion that it is not necessary to require the Respondents to make contributions to the Local 32E Health Fund in order to make whole the replacement employees, given that the Board's order requires the Respondents to pay the replacements for any medical expenses incurred. Because the replacements are not currently employed by a participating employer, and because the Health Fund does not incur liability for paying future benefits based on credit service earned, there is an insufficient actuarial interest at stake to warrant an order requiring contributions to the Health Fund on the replacements' behalf.

gave them the names and addresses of locations where they could apply for jobs.

Rivera further stated that the 3 men contacted him about 8 times per month and visited his office once or twice per week. He made calls to prospective employers on their behalf and sent them to many places where jobs as porters might be available. Rivera did not keep any records of where he sent the employees and could not recall at which locations the men sought work. Nevertheless, Rivera produced a record which stated that Maria visited his office and he sent him out to prospective jobs12 times within 3 months, in the summer and fall of 1999. However, Rivera's testimony as to the number of times he sent Maria to jobs during the period 1997 through 1999 was confusing. At first he testified that during that period of time he sent Maria out a couple of times, but then said that the referrals were more often than the 12 times set forth on the list.

3. Employee Carmelo Delgado

Delgado was employed at the building located at 1849 Sedgwick Avenue for 15 years. On July 1, 1997 he was refused hire by Respondents. Delgado testified that 1 week later he visited the Union's office and spoke to Union delegate Rivera, and also spoke to the Union's president and the president's secretary. He was told that he would be called if the Union was able to find a job for him. Delgado stated that the Union never advised him of a job opportunity, and specifically denied that Rivera gave him any addresses of possible job opportunities.

Thereafter, Delgado visited the Union several times and also called Rivera inquiring about available jobs. He also searched for work on his own, visiting about 10 companies which included factories, grocery stores and apartment buildings. During such search for work he completed no written job applications and was told by the firms he visited that no jobs were available. Delgado kept no records of places he visited and could not recall the names of any organizations he went to. He also asked his friends if they knew about job openings.

On May 13, 1998, Delgado became employed at Transworld Marketing Corporation in East Rutherford, New Jersey where he did cleaning work. He worked there 5 days per week until he was reinstated by Respondents in November, 1999. Delgado commuted from his home in Manhattan to that job in New Jersey, spending about $25 to $30 per week for gasoline, and $4 per day for tolls.

Respondents argue that Delgado's failure to keep a written record of his search for work precluded them from examining Delgado concerning the companies he visited. This is especially so where Delgado could not remember the firms at which he sought work. However, the Board has held that "it is not unusual or suspicious that claimants cannot remember the names of employers or employer representatives to whom they spoke, or the times they visited such prospective employers." *Fabi Fashions*, supra at 587. I accordingly find that Respondents have suffered no prejudice in Delgado's failure to keep a written record of his job search.

The question that I have to resolve is whether Delgado engaged in a reasonable search for work.

I credit Delgado's uncontradicted testimony concerning his search for work. He visited various business organizations, spoke to friends, and ultimately found work less than 1 year after Respondents' refusal to hire him. Although the testimony of Union representative Rivera that he sent Delgado on numerous job possibilities is not corroborated by Delgado, nevertheless Delgado's testimony establishes that he diligently searched for work by asking Rivera about job possibilities and sought work on his own by going to various firms. Such efforts have been found to represent a diligent search for work. *United Aircraft Corp.*, 204 NLRB 1068 (1973). His search for work was ultimately successful as seen in his obtaining a job at Transworld.

Although Delgado "may have had some difficulty in recalling past events, and kept poor records, he nevertheless testified openly and fully to the best of his recollection and maintained that he had disclosed all of his interim earnings and withheld nothing. The burden is on the Respondent to show otherwise and it is clear to us that this burden has not been met." *Arduini Mfg. Corp.*, 162 NLRB 972, 975 (1967). The Board's reasoning applies equally here.

Based upon Delgado's testimony concerning his search for work and the fact that Respondents have not shown that he failed to make a reasonable search, I find that Delgado is entitled to backpay.

I agree with General Counsel's further argument that Respondents are responsible for the expenses that Delgado incurred while working at Transworld. *United Enviro Systems*, 323 NLRB 83, 86-87 (1997). His credited testimony established that during his daily trip from Manhattan where he lived to the job at Transworld in New Jersey he spent $4.00 per day in tolls and about $25.00 to $30.00 per week in gasoline.

Delgado's commuting expenses incurred in his interim employment at Transworld have been included in the Compliance Specification. They consist of expenses of $332.50 in the second quarter of 1998, $617.50 in the third quarter of 1998, $617.50 in each quarter thereafter through the third quarter of 1999, and $380.00 for the fourth quarter of 1999. The sums set forth for interim expenses coincide with the period during which Delgado commuted to work in New Jersey. They are accordingly properly included in the Compliance Specification computations.

4. Employee Juan Maria

Maria was employed at 1849 Sedgwick Avenue for 17 years as a porter. He stated that about 2 weeks after Respondents' refusal to hire him on July 1, 1997 he visited the Union. He continued to go to the Union seeking work once or twice per week and called Union representative Rivera each day.

Maria testified that Rivera gave him addresses and phone numbers of superintendents of buildings which may have needed porters and Maria visited those locations. However, no positions were available and the superintendents said they would advise Rivera when there was an opening. Maria could not recall the locations of the buildings he called or visited since they were far from his home. As set forth above, Rivera gave detailed testimony concerning Maria's extensive visits to his office and that he sent Maria to jobs during the period 1997 through 1999.

Maria completed a job application dated April 16, 1998 which he submitted for a job as a porter in a building in which his friend works. Maria made copies of that application and used them when he visited other firms.

Two documents, each bearing 3 addresses and phone numbers were received in evidence. Maria testified that these were locations of buildings written by his son in law and his brother, and that he visited the superintendents at those buildings in late 1997 and early 1998 and followed up with frequent phone calls inquiring whether they had openings. He received no offers of employment from those locations.

Maria also asked his friends if they knew of a job. Such "word-of-mouth" job search is appropriate and has been considered by the Board to be a proper search for work. *Black Magic Resources*, 317 NLRB 720, 722 (1995). He was obviously mistaken when he testified that he did nothing to look for work aside from speaking to Rivera. His contrary testimony established that he utilized other means of searching for work. He estimated that he went to 20 to 25 places to look for work between July, 1997 and May, 1998.

Maria made small repairs including cleaning windows for tenants during the backpay period. He earned about $500 per year in each of the years of 1997, 1998 and 1998, for a total of $1500. Such interim earnings were included in the amended Compliance Specification received in evidence.[1]

With respect to Maria's search for work, I find that he engaged in a diligent effort to find employment. Despite some confusion in their testimony, Rivera corroborated Maria's version that Maria visited the Union's office frequently in an effort to obtain referrals and that Rivera sent him to locations where jobs might be available. In addition, Maria visited numerous locations searching for work in 1997 and 1998 including 6 specific addresses which he visited and later phoned to check on job availability. His performance of window cleaning and other jobs for tenants demonstrates that he was interested in working and did not remain idle willfully.

Maria testified that although he did not retire he applied for and received Social Security retirement benefits in May, 1998 when he was 63 years old. He did so because he could not find a job following Respondents' refusal to hire him in July, 1997. Although he collected such benefits he continued to look for work and did not retire and had no plans to retire. Although he received a letter in June, 2000 from the Social Security Administration which stated that anyone over 65 years old could continue working without having his benefits reduced, he stated that he was aware, prior to receiving that letter, that he could work and still collect such benefits as long as he did not earn more than $17,000 per year. When he applied for retirement benefits in May, 1998 he was told that he could continue to work. He stated that he kept looking for work even after he began receiving those benefits and indeed was reinstated by Respondents in November, 1999 while still collecting retirement benefits.

Respondents argue that Maria's backpay must be tolled upon his retirement from work. Respondents contend that Maria actually retired from the workforce. In support of that contention Respondents rely upon the Union's pension plan description which provides that "your pension will not start until after you actually retire." Maria stated that when he applied for pension benefits when he was 63 years old, he told a pension representative that he wanted to receive a pension because of his age. In fact, he still receives pension money notwithstanding that he returned to work in November, 1999. He was not told by a pension representative that he had to retire in order to receive pension benefits. Union representative Rivera denied being told by Maria that he had retired.

I cannot find that Maria actually retired from the workforce as argued by Respondents. He accepted reinstatement and was working at the time of the hearing despite receiving Union pension benefits. Notwithstanding the language in the pension plan description the Union has been providing pension benefits although it was undoubtedly aware that he was continuing to work.

Respondents argue that the pension and Social Security retirement benefits received by Maria must be offset against the amounts of backpay they owe to him. As to the pension benefits, the Board has held that "a vested pension constitutes a contractual obligation to the employee and that benefits paid to vested employees under such a pension plan are in the nature of delayed compensation for former years of faithful service." As such, pension payments do not constitute earnings of employees during the backpay period but are instead a non-deductible collateral benefit. *United States Can Co.*, 328 NLRB No. 45, slip op. at 8-9 (1999). The Board reasoned that inasmuch as the "source of pension benefits received by the discriminatees was the trust fund and not the respondent, said payments were clearly from a collateral source and not deductible from backpay." The Union's pension plan provides that benefits vest after 5 years of service. Inasmuch as Maria had been covered by the plan for 17 years at the time of Respondents' refusal to hire him, his benefits in the plan were vested.

Similarly, Maria's receipt of Social Security retirement benefits may not be offset against a backpay obligation. *F & W Oldsmobile*, 272 NLRB 1150, 1152 (1984).

I accordingly find that the pension benefits and Social Security retirement benefits received by Maria during the backpay period may not be offset against Respondents' backpay obligation.

At the hearing Maria presented his 1999 tax return showing income received in that year. The form indicated that Maria earned "wages, salary, tips, etc." of $2,746 that year. Maria explained that that sum represented the wages he received from Respondents following his reinstatement in November, 1999. Respondents argue that that amount must be deducted from the backpay due to him. I disagree. Maria gave uncontradicted testimony that such sum was not earned as interim earnings during the backpay period but constituted wages for work performed following his reinstatement by Respondents. Accordingly, Respondents are not entitled to offset that amount against the backpay owed to Maria.

5. Employee Henry Minaya

Respondents apparently do not contest Minaya's search for work as no evidence was adduced concerning that issue.

[1] General Counsel's Exhibit 2.

6. Employee Jose Reyes

Prior to the date he was refused hire by Respondents, Reyes had worked at 1849 Sedgwick Avenue as a porter for about 6 years.

Reyes stated that he spoke with Union representative Rivera on July 1, 1997 when he was refused hire. Although Rivera gave him no referrals of employment he said he would contact Reyes when a job became available, and asked Reyes to call him. Reyes called Rivera about 2 to 3 times per week and asked about job openings.

In addition, Reyes visited grocery stores and supermarkets in an effort to find work. Some of those firms told him that no jobs were available and at others he completed a job application.

In about August, 1997, Reyes began work at Burnside Grocery. This was a temporary position during which he worked about 2 to 3 days per week for 1 to 3 hours per day during the 2 Summer months. He earned about $30 to $40 per day. He stocked merchandise when it arrived at the store and restocked the refrigerators. He was told in advance when to report to work.

Reyes next worked in September or October, 1997 at Bravo supermarket where he unloaded merchandise and arranged the items on shelves. This too was a temporary job in which he worked about 2 to 3 hours per day when merchandise needed to be unloaded. He worked at that job for about 3 to 4 months for which he received $30 to $35 per day.

Reyes' next job was for Sima Import/Export Company which began in about October, 1997. This temporary job consisted of unloading trucks. He was employed there 2 days per week for about 5 weeks, earning $60 to $70 per week.

In November, 1997, Reyes worked as a substitute porter for Apartment Rental Master. He was employed there irregularly for about 8 months only when the porter was on vacation. He earned about $278.00 per week.

Reyes stated that he received no earnings statement from Burnside Grocery, Bravo or Apartment Rental Master. He was paid in cash by all those companies except Apartment Rental Master.

In addition to the above jobs that Reyes held, he also looked for work at other firms including National Supermarket, Bronx Parking, Apex Express, Dearbone MGM, Associated Supermarket, 600 West Realty Corp., American Ways Rent-A-Car, and Concourse Plaza Redevelopment. Reyes testified that he looked for work at other businesses but could not recall their names.

Reyes testified that when he was refused hire in July, 1997, his wife was a student at Bronx Community College. When Reyes was unsuccessful in finding a permanent job his wife decided to join the U.S. Army in order to help support their family. She enlisted in October, 1997 and was assigned to Fort Hood, Texas in the fall of 1998.

Reyes and his wife moved to Texas where he looked for work at the Army base and the surrounding areas. He sought work at 2 Army commissaries, an Army Exchange, the Killen Independent School District, Sears, and K-Mart where he completed an application but did not take a required English test because he did not speak or read English. Many employers told him that they preferred veterans and he is not a veteran. However, he found work cutting grass at about 5 to 7 homes per week, receiving $25 to $30 per house, earning a total of about $2,000 during his one year stay in Texas.

In November, 1999, he left his family in Texas and returned to accept Respondents' offer of reinstatement at 1849 Sedgwick Avenue.

Respondents do not contest the fact that Reyes made a diligent search for work. Respondents' brief states that he made "reasonable, documented efforts to look for work." However, Respondents assert that his interim earnings amounts must be adjusted to reflect his testimony concerning the work he performed.

Apparently, all the interim earnings Reyes received prior to his move to Texas have been included in the Specification. Such a finding is supported by Respondents' statement in their brief that his backpay must be reduced by the earnings he received mowing lawns.[2] Accordingly, it appears that Respondents are placing in issue only the earnings he received for cutting lawns. However, I will discuss his other interim earnings in the event that Respondents are also contesting those sums.

At Burnside Grocery Reyes worked 2 to 3 days per week for 8 weeks and earned $30 to $40 per day. An average of his earnings would be 2 ½ days per week multiplied by 8 weeks multiplied by $35 per day or a total of $700.

At Bravo Supermarket Reyes worked an average of 2½ days per week for 3 to 4 months (an average of 14 weeks) earning an average of $32.50 per day. The total earned at Bravo would be $1137.50.

At Sima, Reyes worked 5 weeks for an average of $65 per week or a total of $325.00. His sporadic, substitute porter work for Apartment Rental Master constituted work of approximately 7 weeks, or once in every 4 ½ weeks over the 8 months of his employment. Seven weeks at $278 per week equals $1946.00.

The totals of the above interim employment equals $4108.50 which approximates the amount claimed as interim earnings in the Specification: $4132.21.

Accordingly, I agree with Respondents' argument that Reyes' lawn cutting work was not included in the interim earnings set forth in the Specification. However, I do not agree with the amount claimed by Respondents for such work. Respondents contend that the correct figure for such work is $8580 which assumes that he cut the lawns of 6 houses each week for 52 weeks during the one-year he lived in Texas.[3]

Although Reyes testified that he cut an average of 6 lawns per week he also stated that there were weeks in which he cut no lawns, and that he earned only $2,000 doing such work in his year's stay in Texas. Earning $2,000 at $27.50 per lawn means that he cut about 73 lawns, or about 1.4 lawns per week during his year in Texas. It is unlikely, as argued by Respondents, that he cut an average of 6 lawns every week for 52

[2] Brief, page 26. Respondents also argue that his backpay must be reduced by the severance pay he received and bonus pay as set forth in the Specification. Those issues are discussed below.

[3] He earned $25 to $30 for each lawn he cut, or an average of $27.50 per lawn.

weeks especially since Reyes stated that there were weeks in which he cut no lawns.

I therefore accept Reyes' testimony that he earned $2,000 cutting lawns during his one-year stay in Texas. Inasmuch as I find that those interim earnings were not included in the Compliance Specification I will deduct $2,000 from the backpay due to Reyes.

B. Bonus Payments

The Specification provides for a bonus payment of $275.00 for employees Delgado, Maria, Minaya, and Reyes in the fourth quarter of each of the years 1997, 1998 and 1999, and a bonus payment of $750.00 for superintendent Diaz in the same period of time.

There was no evidence adduced at the hearing concerning the practice of paying bonuses and the contract does not provide for the payment of bonuses. Respondents' answer to the Specification denies generally the allegations of the Specification but does not specifically put in issue the alleged bonus payments. In their brief, Respondents argue that inasmuch as no evidence was offered to support any entitlement to bonuses, such amounts must be stricken from the Specification.

It is well settled that in a backpay proceeding the General Counsel's sole burden is to show the gross amounts of backpay due. Once he has done so, "the burden is upon the employer to establish facts which would … mitigate that liability." *Mastell Trailer Corp.*, 273 NLRB 1190 (1984).

The issue of bonuses was not raised in Respondents' answer or at the hearing. In fact, Respondents' stipulated that, except for issues as to interim earnings and attempts to find work, the "methods of calculations and the amounts" set forth in the Specification were correct. Accordingly, I find that Respondents do not dispute that the bonus payments amounts were properly includible in the Specification. Further, General Counsel was never fairly apprised of Respondents' argument concerning bonus payments and "had no reason to introduce any evidence or arguments to rebut it…." *Teamsters Local 469 (Coastal Tank Lines)*, 323 NLRB 210, 218 (1997).

Furthermore, information concerning bonuses paid to employees is a matter "entirely within the knowledge of respondent. Thus, respondent's failure to set forth in its answer the basis of its disagreement with the figures themselves operates as an admission that the figures are accurate. Section 102.54 of the Board's Rules and Regulations. Accordingly, the General Counsel was not obligated to offer evidence in support of the accuracy of the figures contained in the specification." *United Contractors Incorporated*, 238 NLRB 893, 894 (1978).

C. Severance Pay

Respondents assert that moneys received by Delgado, Maria, Minaya and Reyes by checks dated January 15, 1998 represent severance pay which must be deducted from any backpay due them. The checks were issued on the account of Respondents 1849 Sedgwick Realty, LLC, and are for the following amounts: Delgado, $18,435.22; Maria, $20,436.18; Minaya, $8486.72; Reyes, $5979.36.

These checks were apparently the result of an arbitration between Respondents' predecessor, Morris Heights Apartments, Inc. and the Union. The Union filed a grievance concerning the alleged violation of the contract's sale and transfer clause. The clause provides, in relevant part, that when the Employer sells the building the contract of sale must include a provision that the buyer assume and adopt the collective-bargaining agreement. If the Employer fails to require the assumption and adoption of the contract, it must pay severance pay to the employees.

An arbitration hearing was held on July 17 and 24, 1997. The arbitrator upheld the grievance, deciding that the above employees were entitled to severance pay of 2 weeks' pay for each year of service, and also unused sick pay and vacation pay. Apparently there was some adjustment after the award was issued since the amounts awarded by the arbitrator are less than that set forth in the check received by each employee.

Employees Minaya and Reyes testified that they and the other employees received the checks at the Union where employer attorney Ira Drogin and Union attorney Scott Trivella were also present.[4] Minaya and Reyes stated that the workers were told that their payment was for the time that they had worked at the building prior to their being refused hire on July 1, 1997.

Respondents conceded at the hearing here that the award did not relate to moneys earned or due during their ownership of the building because the employees involved were not hired by Respondents. However, Respondents argue that inasmuch as the checks were issued on their account in January, 1998 during the backpay period, the amount given as severance pay must be offset against any backpay due.

Respondents further assert that the severance payment must be reduced from any backpay due to the 4 employees because the severance pay award constitutes "double back pay" providing them with a "windfall" and a penalty to Respondents. Respondents also argue that the employees were awarded severance pay because of Respondents' refusal to hire them.

I disagree. First, according to the collective-bargaining agreement and the arbitrator's award, Morris Heights as the seller of the building was responsible for the payment of severance pay, and not the Respondents as the buyer of the building. The fact that the checks were issued by Respondents was not explained in the record. Second, the severance pay award was a contractual matter pursuant to which it was apparently found that Morris Heights violated its contract by not requiring that the agreement be assumed. That violation resulted in its being required to make the severance payments. Respondents' refusal to hire the 4 workers was unrelated to the severance pay award.

Severance pay is properly considered as interim earnings. *W.R. Grace & Co.*, 247 NLRB 698, 699, fn. 5 (1980). However, the cases relied upon by Respondents are inapposite.[5] They involve situations where the respondents made payments to the workers during their employment as an inducement to them to leave their jobs. The Board properly ordered that such payments be considered as interim earnings and deducted from

[4] Those attorneys represented their respective clients at the arbitration hearing.

[5] *Tilden Arms Management Co.*, 276 NLRB 1111, 1120 (1985); *J.R.R Realty Co.*, 273 NLRB 1523 (1986); *The A.S. Abell Co.*, 230 NLRB 17, 21 (1977).

the backpay due them. The Board noted that to do otherwise would result in a windfall for the employees and a penalty against the respondent. *J.R.R. Realty*, supra.

In contrast, here there is a question whether the funds used to pay the severance amount were from Respondents' funds. Although the checks were issued by Respondents, the responsibility for payment of severance pay was that of Morris Heights. Second, the severance payments accrued as a result of Morris Heights' failure to require Respondents to adopt the contract. Inasmuch as the 4 employees had not been hired by Respondents no severance payments were owed them by Respondents. In addition, the severance pay did not cover any period of time within the backpay period as it related only to their employment prior to July 1, 1997.

I accordingly find that the severance payments may not be reduced from the backpay due the employees.

D. Payments to the Welfare Fund and the Pension Fund

It was stipulated that on May 2, 2000, Respondents made a payment of $2,277 to the Union's Health and Welfare Fund and $1,035 to the Union's Pension Fund. It was further stipulated that since July 1, 1997, those sums were the only contributions made to those funds by Respondents. It was also agreed that since July 1, 1997, the Union's Welfare Fund, on behalf of employees Delgado, Daniel Diaz, Maria, Minaya and Reyes incurred out of pocket medical expenses of $24,916.22 which represented the total payments made by the Fund for the period July 1, 1997 through June, 2000.

The Specification provides that Respondents must make contributions to the Welfare Fund and the Pension/Retirement Fund in behalf of the 4 employees refused hire and also in behalf of the replacement employees.

Respondents deny that they have any responsibility to make contributions to the funds, contending that the Order issued in the underlying case does not provide for such payments. In support of that argument, Respondents contend that payments to the funds were not contemplated since the Order was not accompanied by the typical statement that interest on the funds be calculated according to *Merryweather Optical* Co., 240 NLRB 1213 (1979).

Respondents further assert that since the Order does not mention replacement employees, any fund payments or even payments of backpay to them are not proper.

As emphasized by Respondents, I am limited in deciding compliance matters by the terms of the original Order. *Dahl Fish Co*., 299 NLRB 413, 424 (1990). I find that the findings and the Order in the underlying case are specific and do provide for the payment of contributions to the funds.

As set forth in the underlying Decision, Respondents made changes in the wages and benefits of the unit employees. The superintendent and the replacement handymen earned less than the wages provided in the Local 32E contract and they were not given the pension and health benefits specified in the contract. The Respondents did not bargain with Local 32E before making these changes. Because the Respondents did not offer jobs to the employees of the predecessor employer in order to avoid dealing with Local 32E. Respondents were not free to change the initial terms of employment.

The standard remedy was ordered in the underlying case. It provides that Respondents, having failed to offer employment to Delgado, Maria, Minaya and Reyes must "make them whole for any loss of earnings and other benefits." It further provides that:

> The Respondents, having unlawfully refused to recognize Local 32E and having made unilateral changes in employment conditions, must be ordered to recognize and bargain with Local 32E and retroactively to restore the terms and conditions of employment that existed under the predecessor's contract with Local 32E until such time as the Respondents and Local 32E bargain to agreement or to impasse, and to make whole the bargaining unit employees in a manner consistent with the contract's provisions. *Galloway School Lines, Inc*., 321 NLRB 1422, 1425 (1996).

The Order requires Respondent to:

> On request of Local 32E, rescind any departure from terms and conditions of employment that existed immediately prior to July 1, 1997, retroactively restoring preexisting terms and conditions of employment, including wage rates and benefit plans, and make whole the bargaining unit employees by remitting all wages and benefits that would have been paid absent unilateral changes beginning July 1, 1997, until such time as the Respondents and Local 32E bargain to agreement or to impasse. The remission of wages shall be computed as in *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

No exceptions were filed to the decision in the underlying case, and the Board directed Respondents to take the action set forth above. The Second Circuit Court of Appeals enforced the Board's Order. I reject Respondents' argument that since they believed that they were not being ordered to make payments to the funds they did not file exceptions to the judge's decision. A plain reading of the remedy and order as well as Board law leaves no other conclusion but that payments to the funds were required.

In *D & S Leasing*, 299 NLRB 658 (1990), a case which also involved a refusal to hire employees and unilateral changes, an order was issued which was identical to that issued in the instant case. In the compliance proceeding following that case, *Centra Inc*., 314 NLRB 814, 816 (1994), the Board ordered the respondent to make whole the union's pension and health and welfare funds notwithstanding the respondent's argument that it had no obligation to make any contributions to such funds. The Board noted that:

> The appropriate remedy for unlawful withdrawal of recognition and unilateral changes in employee benefits is the restoration of the status quo ante…. The restoration of the status quo ante includes the payment by the offending employer not only of backpay … but, separately, reimbursement, with interest, by way of contributions to welfare funds and pension funds existing under an expired collective-bargaining agreement which the employer would have made but for unfair labor practices in unilaterally failing to do so. 314 NLRB at 817.

In a similar case involving a successor's refusal to hire employees and unilateral changes in employment conditions, the respondent was ordered to honor and give retroactive effect to a collective-bargaining agreement, "including payment of wages and benefits as prescribed". *J.R.R. Realty Co.*, 273 NLRB 1523, 1528-1529 (1985). That decision contained no *Merryweather Optical* provision. Following the decision, a supplemental decision concerning backpay was issued which interpreted the order as requiring the restoration of terms and conditions of employment which were set forth in the collective-bargaining agreement. *J.R.R. Realty Co.*, 301 NLRB 473, 480 (1991), enforced 955 F.2d 764 (D.C.Cir. 1992), cert. denied 506 U.S. 829 (1992). In that supplemental decision it was held that the respondent was required to make payments to the union's pension and health funds as set forth in the contract, 301 NLRB at 474, 480.

Counsel for Respondents who represented J.R.R. Realty in the above case, made identical arguments to the Board there as he does here, that inasmuch as the Board's remedy only covered the discriminatees, Respondents were entitled to set initial terms and conditions of employment of their new, replacement employees, and accordingly the replacement workers were not entitled to receive the enhanced remedy provided. Respondents further argued in both cases that requiring the restoration to the *status quo ante* improperly requires it to assume its predecessor's contract with the Union in violation of *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

The Board expressly rejected those arguments, noting: "The judge found, and we agree, that replacement employees who were employed after January 1, 1989, are entitled to Local 32B contractual wages and benefits." 301 NLRB at 473, 480, 482. See also *Ad-Art, Inc*., 290 NLRB 590, 591 (1988). In addition, Respondents' argument that requiring them to pay the rates of the predecessor is not remedial but is impermissibly punitive was considered by the Second Circuit Court of Appeals which rejected such arguments. In *NLRB v. Staten Island Hotel Ltd. Partnership*, 101 F.3d 858, 862 (2nd Cir. 1996), the court stated that "if the company had not violated the Act, it would indeed have been free to offer former employees wages at whatever levels it chose …. But the fact is that the company made its hiring decisions on a basis that unlawfully discriminated against former employees on the basis of their union membership, and it is hardly clear what terms would have been reached had the company not so discriminated."

Further, in the instant case, the judge made a finding, to which no exceptions were taken, that "Respondents were not free to change the initial terms and conditions of employment of the unit employees." A respondent is not permitted to relitigate in a compliance proceeding issues that have been litigated in the underlying unfair labor practice proceeding. *Daufuskie Club, Inc.*, 328 NLRB No. 56 fn. 2 (1999). [6]

Respondents further argue that under the Specification's computations the funds will receive a "windfall" for two reasons. First, Respondents are only obligated to pay $24,916.22, the amount actually paid by the Health Fund for health insurance expenses on behalf of Delgado, Diaz, Maria, Minaya and Reyes. Respondents' reliance upon *Manhattan Eye, Ear and Throat Hospital*, 942 F.2d 151 (2d Cir. 1991), denying enforcement to the Board's order in *Manhattan Eye*, 300 NLRB 201 (1990) is misplaced. In that case, the court found that the employees were compensated by substitute benefit plans, there was no evidence that the employees retained any future interest in the health, welfare and pension funds, the workers were not represented by a union, and the union had disclaimed any future interest in representing them.

In contrast, here no substitute benefit plans were provided, the employees were at all times represented by Local 32E, and the workers had an important economic interest in the future financial stability of the Union's funds provided for in their collective-bargaining agreement. Accordingly, the contributions would ensure the viability of those funds. The court stated:

> By refusing to enforce the Board's decision in this case we do not hold that in the exercise of its broad remedial power, it is not empowered to order imposition of the status quo ante in other cases where an employer unilaterally discontinues payments to union-sponsored benefit funds. 942 F.2d at 159.

The Board has indicated that the court's opinion in *Manhattan Eye* was limited to the particular facts therein. *Banknote Corp. of America*, 327 NLRB 625, 628-631 (1999); *Virginia Concrete Co*., 316 NLRB 261 fn. 1 (1995); *Central Management Co.*, 314 NLRB 763, 773 fn. 28 (1994).

Indeed, the Order in this case requires Respondents to retroactively restore preexisting terms and conditions of employment, including wage rates and benefit plans, and make whole the bargaining unit employees by remitting all wages and benefits that would have been paid absent the unilateral changes.

It is clear that Delgado, Diaz, Maria, Minaya and Reyes retained a future interest in the funds inasmuch as they had worked more than the 5 year vesting period required to obtain a Union pension, and contributions made in their behalf would increase their pension benefits. In addition, as current employees of the Respondent who participate in the pension fund they have a future interest in the financial strength of the fund and have vested rights to a pension from the fund. *NLRB v. Coca-Cola Bottling Co. of Buffalo*, 191 F.3rd 316, 324 (2d Cir. 1999). Accordingly, contributions to the funds of Local 32E must be made in their behalf as set forth in the Specification.

With respect to the replacement employees, Respondents argue that inasmuch as they were not employed longer than 2 years and were discharged, they have no future interest in the funds and accordingly Respondents should not be obligated to make contributions in their behalf. It should be noted that the Specification provides for payments to the Funds only during the period of their employment by Respondents, from 8 ½

[6] I reject Respondents' reliance upon *Tilden Arms*, 307 NLRB 134 (1992). In that case, the Board rejected a make whole order in a compliance proceeding which required the employer to restore the pay rate and benefits based upon the contract of the predecessor employer. The Board noted that the original order did not include, as it does here, a requirement that the employer reinstate the terms and conditions of employment set forth in the predecessor employer's agreement with the union.

months to 14 months.[7] As testified by Stuart Gritz, senior payroll auditor of the Local 32E Fringe Benefit Fund, although the replacement employees did not work long enough for Respondents to have their benefits vested in the funds, such employees may benefit from having contributions made in their behalf during their period of employment if their future employment is with an employer having a contractual relationship with Local 32E or Local 32B-J.

I have considered Respondents' argument that, as testified by Gritz, in setting the contribution rates for a particular building the funds base such amount upon the number of workers employed there. In this case, Gritz stated that the contribution amount was set based upon the 5 original employees and that the funds would expect contributions based upon 5 persons. Accordingly, Respondents contend that requiring Respondents to make contributions on behalf of 10 employees – the 5 discriminatees and 5 replacements, is improper and represents a windfall to the funds and a penalty to Respondents.

I do not agree. Regardless of how the contribution was calculated and regardless of Respondents' expectations or even the expectations of the Local 32E funds, the most important factor is the employees' interest in the funds. The replacement employees occupied the same positions as the employees refused hire and were entitled to the same benefits pursuant to the Order issued in this case. The Order required Respondents to make whole the bargaining unit employees. The replacement employees were members of the unit during their employ and were thus entitled to have contributions made in their behalf. Further, in compliance cases, any uncertainty is resolved against the respondent whose wrongdoing created the uncertainty. *Alaska Pulp Corp*., 326 NLRB 522, 523 (1998).

I have also considered *NLRB v. Coca-Cola*,191 F.3rd 316 at 324 (2d Cir. 1999) in which the court, citing *Manhattan Eye*, supra, held that an employee who was discharged prior to his obtaining a vested interested in a pension, is not entitled to have contributions made in his behalf to the pension fund. The court held that the mere possibility that he might be re-employed by the employer was not sufficient to demonstrate a future interest in the fund. However, I am bound by the Board's decision in that case which required the employer to make contributions in the employee's behalf. 313 NLRB 1061,1067-1068 (1994).

I accordingly find that contributions must be made on behalf of the replacement employees to the funds of Local 32E as set forth in the Specification.

Respondents further argue that they are prohibited from making payments to the pension fund because Section 302 of the Labor Management Relations Act makes it illegal for an employer to make such payments except under certain conditions including an existing collective-bargaining agreement between the employer and the union. Respondents contend that since there had never been a contract between them and Local 32E any order requiring payments to the Local 32E pension fund would violate Section 302.

The Board rejected this argument in *Starco Farmers Market*, 237 NLRB 373 (1978), a case involving a successor employer which, like here, had never been a party to a collective-bargaining agreement with the union demanding bargaining. See also *NLRB v. Houston Building Services, Inc.*, 128 F.3rd 860, 864-865 (5th Cir. 1997). In *Starco*, the Board stated, at 376:

> The Respondent cannot now take refuge in the language contained in Section 302(c)(5)(B). As noted, Section 302 was enacted for the purpose of protecting employers form extortion and to insure honest, uninfluenced representation of employees. That section was not intended to provide a shelter for successor employers seeking to avoid the bargaining obligation imposed by the Act. Since the existing terms and conditions of employment, set by the predecessor's contract, cannot be altered until the bargaining obligation has been satisfied, the Respondent cannot defeat this requirement by the interdiction of a section of the Act which was never intended to apply to this set of circumstances. Protecting the integrity of the bargaining process and the right of the employees to have existing terms and conditions continued until bargaining has been accomplished far outweighs literal compliance with the language of Section 302(c)(5)(B).

I accordingly find that Section 302 is not a bar to Respondents' contributions to the funds, in compliance with the Board's Order as enforced by the Court of Appeals.

Based upon the above, I issue the following recommended[8]

ORDER

The Respondent, 1849 Sedgwick Realty LLC and R & S Management a/k/a Arandess Management Company, as a Joint Employer, its officers, agents, successors, and assigns, shall make whole the individuals and entities named below by paying to them the amounts following their names, plus interest on the backpay due the employees[9] and any amounts due the funds,[10] minus tax withholdings on the backpay due the employees required by Federal and state laws:

Carmelo Delgado	$35,448.84
Daniel Diaz	9,842.24
Juan Maria	65,325.00
Henry Minaya	14,220.00
Jose Reyes	60,692.78[11]
Juan Acosta	3,575.12
Franklyn Brea	3,283.22
Sigbert Bynoe	5,412.44
Jose Cuevas	3,735.94
Narciso Mendoza	2,943.00

[7] Acosta, 1 year; Brea, 8 ½ months; Bynoe, 13 months; Cuevas, 1 year; Mendoza, 1 year; Palmero, 14 months; Rodriguez, 2 years. Palmero replaced Acosta and Mendoza replaced Cuevas so a total of 5 replacement employees were employed.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] See *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[10] See *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979).

[11] This figure includes a deduction of $2,000 for Reyes' work in Texas.

Armando Palmero	3,457.50
Jose J. Rodriguez	12,464.32
Local 32E Health Benefit or Welfare Fund	$66,102.00
Local 32E Pension/ Retirement Fund	32,950.00

Dated, Washington, D.C. December 29, 2000